United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7661

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7661

TO BE ARGUED BY
THOMAS M. BREEN

B
P/S

THOMAS L. FITZGERALD, Public Administrator of the County of New York, State of New York, as personal representative of the Estate of JACINTO VICENTE MEJIA RENTERIA, Deceased,

Plaintiff-Appellant,

=against=

ZIM ISRAEL NAVIGATION CO., ZIM ISRAELI NAVIGATION CO., ZIM ISRAEL NAVIGATION CO. LTD., ZIM LINES and AMERICAN-ISRAELI SHIPPING CO., INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS

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The Issues Presented for Review

1. Was the judgment of dismissal for forum non conveniens fair or in the interests of justice when it overturned almost four years of work toward the trial of this case ?

2. Did substantial United States contacts exist in this law suit so that the application of the Jones Act was warranted ?

3. Is summary judgment in favor of Zim-American Israeli Shipping Co., Inc., justified when questions of fact exist about the true ownership of the vessel and the employer of the decedent ?

4. Where in personam jurisdiction is present, can a United States District Court decline jurisdiction given to it by Congress under the statutes 46 U.S.C.A. 761 to 768 - known as the Death On the High Seas Act ?

STATEMENT OF THE CASE

This is an appeal by the plaintiff personal representative of the estate of the deceased seaman Jacinto Vicente Mejia Renteria from an order and judgment of the United States District Court for the Southern District of New York, Honorable Edmund L. Palmieri, U.S.D.J., dated June 30th, 1975, which dismissed plaintiff's suit against the defendant Zim Israel Navigation Co., Ltd., for lack of subject matter jurisdiction under the Jones Act (46 USCA 688) the Death on the High Seas Act (46 USCA 761-768) and the General Maritime Law (131-132 a). * (see page 4)

In the same order (132a) the District Court dismissed any further claim of the plaintiff against Zim Israel Navigation Co., Ltd., on the basis of forum non conveniens provided; (1) plaintiff is given 120 days from the entry of this Order to reinstitute this action in either Ecuador or Israel; (2) Zim Israel agrees to appear and answer in any such action in either Ecuador or Israel ; (3) Zim Israel consents to waive the defense of statute of limitations and all objections to the jurisdiction of the courts of Ecuador and Israel; (4) Zim Israel issues a letter of indemnity in the amount of $25,000.00 to secure its appearance and the payment of any judgment against it pending the outcome of any such action instituted within said period; (5) that in the event plaintiff finds it necessary to institute an action with reference to the bond or letter of indemnity in the amount of $25,000.00 that the defendants and any other person responsible for the payment of $25,000.00, as guarantor, surety, indemnitor, or otherwise will accept service of process through Lamorte, Burns & Co., One

World Trade Center, New York, New York.

This appeal also is against a summary judgment rendered against the plaintiff-appellant and in favor of the defendant Zim-American Israeli Shipping Co., Inc., by the United States District Court for the Southern District of New York, Honorable Edmund L. Palmieri, U.S.D.J., dated June 30th, 1975, (134-135a) on the ground that the plaintiff's cause of action against this defendant is without merit.

The Docket number of the case in the District Court is 71 CIV. 2992 (ELP) (1 a).

Of the five defendants listed in the caption of the case, Zim Israel Navigation Co., Ltd., and Zim American Israeli Shipping Co. are the only actual defendants. American-Israeli Shipping Co. was the former name of Zim American. Zim Israel Navigation Co. and Zim Israeli Navigation Co., are non-existent corporations. Zim Lines is a trade name (108 a).

The proper name of the second actual defendant is Zim-American Israeli Shipping Co., Inc., sued herein as American-Israeli Shipping Co. Inc. (25 a).

The Public Administrator of the County of New York, State of New York, was duly substituted as party plaintiff by order of the District Court on December 4th, 1973. (10 r memo endorsed).

* References are to joint appendix submitted by the plaintiff-appellant unless otherwise indicated.

STATEMENT OF THE FACTS

Plaintiff's decedent was a merchant seaman aboard the vessel M. V. Dahlia - a vessel flying the Israeli flag and owned and operated by the defendants. On April 19th, 1968, while working on a boom of the vessel under dangerous conditions he was caused to fall to the deck of the ship, and he was seriously injured. He was a citizen of Ecuador. Because of his injuries and inadequate medical treatment he died aboard the ship on April 23rd, 1968. When the captain of the vessel finally summoned medical assistance after a long delay, a United States Coast Guard doctor came to the vessel and treated the decedent.

When the decedent was injured the vessel was on the High Seas about 500 miles distant from Yokohama, Japan en route to its destination-New York.

The U.S. Coast Guard ordered the transfer of the body to the Island of Midway and then to Honolulu where an autopsy was performed. After the autopsy the body was returned to Ecuador for burial. The decedent was approximately 24 years of age and he left surviving a 19 year old widow and a child 2 and one-half years old. (154 a).

The U.S. Coast Guard investigative report indicated " that at least 32 hours elapsed before the request for medical advice was received. For injuries of this nature, prompt medical treatment is essential and this delay may well have been critical even if immediate evacuation to a fully equipped medical facility had been available. " - B. F. Engel, Rear Admiral, U.S. Coast Guard, Commander, 14th Coast Guard District, September 9th, 1966.

The defendants obtained an alleged release from the widow in 1968, in exchange for the sum of $2,400.00 . (51 a - 52 a) As shown at 86 a, the check was issued out of New York City.

Plaintiff's suit is to recover money damages for the personal injuries and death of the decedent under the Jones Act (46 USCA 688) the Death on the High Seas Act (46 USCA 761-768) and the General Maritime Law.

A consent pre-trial order (136 a - 148 a) was signed by the Honorable Edmund L. Palmieri U.S.D.J. on March 13th, 1975 . The defendants made their motions for dismissal on March 19th, 1975 (29 & - 53 a).

With reference to issue of forum non conveniens , plaintiff wishes to call the Court's attention to the third paragraph of the order of the District Court dated February 25th, 1974 (149 a),the letter from the Chambers of Honorable Edmund L. Palmieri, U.S.D.J. dated November 4th, 1974 , (150 a) and the letter from opposing counsel dated December 4th, 1974, (151 a) all indicating that everybody understood that this lawsuit was being prepared for trial in New York City.

POINT I

JUDGMENT OF DISMISSAL FOR FORUM NON CONVENIENS IS NOT FAIR NOR IN THE INTERESTS OF JUSTICE WHEN WORK ON THE MERITS OF THE CASE HAS CONTINUED FOR ALMOST FOUR YEARS.

In a memorandum attached to its decision on the motion for reargument (133 a), the District Court referred to the case of Fitzgerald v. Texaco (Court of Appeals Docket No. 74-1468), reported at 521 F 2d 448 (2 Cir 1975).

Pages 2 and 3 of the brief of the defendants-appellees in that case give the following time table:

Page 2 actions commenced in December 197[illegible] January 1973 by Public Administrator .

Page 3 B motion for forum non conveniens March 2, 1973.

Magistrate's Report dated January 23, 1974.

Memorandum order of Judge dated March 26, 1974, dismissing actions on the ground of forum non conveniens .

The dates in the 74-1468 suit (Docket No. of this Court) show that the motion for forum non conveniens was made within 60 to 90 days after the commencement of the action. In the case at bar the motion was made three years and 9 months after the suit was filed (53 a) and after all parties understood that the case was to be tried in New York. (149 a - 151 a).

In docket No. 74-1468 (this Court) the brief of the defendants-appellees states that the order of dismissal was entered 15 months after the suit was

started. In the case at bar the District Court entered its order of dismissal 4 years after the case had been begun in New York (131 a - 132 a).

During four years, the docket sheets record the following work performed by both sides :

1. Substitution of Public Administrator as party plaintiff on December 4, 1973, (2 a).

2. Filing interrogatories of plaintiff on August 25, 1971 (2 a).

3. Filing of answers by defendants to interrogatories of plaintiff on May 7, 1974 (2 a) and on October 16, 1974 (3a) .

4. Request by plaintiff for production of documents filed by plaintiff on August 3, 1973 (2a) Motion filed by plaintiff for sanctions under Rule 37 on January 22, 1974 (2a). Decision of the Court filed on February 25, 1974 (2a).

5. Notice by plaintiff of taking testimony of fact witness Ignacio Ortega filed on July 19, 1974 (2a); notice by plain tiff of taking testimony of fact witness Hugo Salazar filed on October 7, 1974 (3a). Notice of deposition of Harvey Krueger on financial material filed on January 6, 1975 (3a).

6. Interrogatories of defendants to plaintiff filed on October 18, 1974 , (3a); answers of widow to these interrogatories December 18, 1974 (3a).

7. Request of defendants for discovery and inspection filed on January 14, 1975 (3a) .

8. Consent pre-trial order filed on March 25, 1975, signed by Honorable

Edmund L. Palmieri, U.S.D.J. on March 13, 1975, (136a - 148 a).

The defendants took the testimony of Captain Mendelson of the M. V. Dahlia on November 23rd, 1974. During the captain's testimony he identified the Ship's Logs, the accident report and records of treatment given to the decedent on the ship.

In Philadelphia on May 17th, 1975, second mate Nikos Pantelos described the treatment given to the decedent. The second mate was in charge of the decedent after he was injured, and he so testified in his deposition.

The pre-trial order describes the Exhibits to be offered by the plaintiff at the time of trial (141a - 142a). Exhibits to be offered by the defendants are listed at 143a . The names of the witnesses for trial follow on page 144a. It is clear from an examination of the Exhibits and the list of witnesses that the case was ready for trial except for each side calling a marine expert and a medical expert (144a - 145a).

The defendants have never contested the legality of the residence of the widow of the decedent in New York City. Neither have they submitted a list of witnesses or the content of their testimony which would be taken in Israel or Ecuador. The defendant Zim-American is a subsidiary 100% owned by the defendant Zim Israel Navigation Co. Ltd. (17r - p. 3). The check paid to the widow for the alleged release was issued out of New York (86a). If she is forced to have her case tried in Israel, she will receive nothing. / (87-89a) Compelling the widow to go to Ecuador will not assure her of her right to a jury trial, the Doctrine of Comparative Negligence or the Abolition of the Fellow Servant Rule .

In the Case of Beach v. National Football League, 331 F. Supp. 249 (S D N Y 1971) the Court made the following statement about motions for forum non conveniens at page 251 :

" (1-3) One can pull a variety of categorical precedents from the shelves on either side of a motion to transfer. But the real test is fairness and the interests of justice, conceptions which elude certainty . Generalizations are of limited value. But we note that in private anti-trust suit the plaintiff generally has a wide choice of venue. American Football League v. National Football League, 27 F.R.D. 264, 267 (D. Md. 1961); O'Neil Trucks Pty. Ltd. v. Pacific Car and Foundry Co., 278 F. Supp, 839, 842-843 (D. Haw. 1967). Unless the balance of convenience of parties and witnesses and the interests of justice is strongly in favor of the defendants the action should not be transferred, although the balance in favor of transfer need not be quite as strong as it would have to be under the doctrine of forum non conveniens. A. Olinick & Sons v. Dempster Brothers, Inc., 365 F. 2nd 439, 444-445 (2 Cir. 1966); Ferguson v. Ford Motor Co., 89 F. Supp. 45, 50 (SDNY 1950), **** "

It would be an injustice to send the plaintiff in this case to another forum after four years of work.

The Supreme Court of the United States held that the discretion of a court to transfer for forum non conveniens was narrower than in change of venue cases under 28 USCA 1404 a; this Court declared in Norwood v. Kirkpatrick, 349 US 29, 32, 75 S. Ct. 544 , 546 (1955) :

" **** As a consequence, we believe that Congress, by the term " for the convenience of parties and witnesses, in the interest of justice, " intended to permit courts to grant transfers upon a lesser showing of inconvenience . This is not to say that the revelant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader . "

Readiness for trial is one of the factors that determine whether a

case should be transferred. In Coffill v. Atlantic Coast Line Railroad Co. 180 F. Supp. 105 (EDNY 1960), the Court refused to transfer a case from the Eastern District of New York where it had been pending for four years. Another Court denied a motion for transfer in a seaman's case where the defendant had waited 15 months to bring a motion under 28 USCA 1404 (a) (Caster v. US Line Co. 200 F. Supp. 707) (SDNY, 1961).

The plaintiff will be prejudiced if transfer is ordered at this late date. There is no assurance that the case will be promptly reached for trial in Ecuador or Israel. The defendants have not shown what remedies are available to the plaintiff in the transferee forum. The transfer to another forum presupposes that the action could have been instituted previously in that forum. Nowhere has the defendant claimed that the plaintiff would have a right to a jury trial, that the burden of proof in a death case would be less than in a personal injury case, and that the Fellow Servant Rule has been abolished in these countries. The vessel of the defendants had an Israeli flag, and they had the decedent sign an adhesion contract stating that the law of Israel would prevail. (40 a - # 11). The defendants rejected the law of Ecuador in favor of Israel when the decedent seaman signed the adhesion contract; the letters from the Israeli Insurance Institute clearly prove there is no remedy for the widow and her daughter under Israeli law (87 - 89 a), because the survivors are non-residents of Israel. The truth of the matter is that the defendants want the case transferred to a country where there is no remedy. In this case the defendants have been forum-shopping.

In Hoffman v. Blaski, 363 U.S. 335 , (1960) the Supreme Court declared at pages 341 and 342 :

> " **** They concede, too, that 1404 (a), being " not unlimited ", " may be utilized only to direct an action to any other district or division where it might have been brought ', " and that, like the superseded doctrine of forum non conveniens, Gulf Oil Corp., v. Gilbert, 330 U.S. 501, 507, the statute requires " an alternative forum in which plaintiff might proceed. "

The defendants have not demonstrated the procedural or substantive remedies that plaintiff would be entitled to if this case were transferred to Israel or Ecuador. In this forum they have taken the testimony of their Witnesses, cross examined the witnesses of the plaintiff and they have been furnished with a copy of the United States Coast Guard medical record of the decedent in English. To transfer this case to Israel or Ecuador would harass the plaintiff and oppress the widow in the preparation of her case. The Captain and the Second Mate who testified for the defendants both spoke English.

These are additional cases where the Courts have refused to order a transfer :

Heiser vs. United AirLines 167 F. Supp, 237 (S.D.N.Y. 1958). The Court held that questions of foreign law could be solved in the Southern District of New York because of this Court's previous experience with foreign law .

Kontos v. S.S. Sophie C. 184 F. Supp, 835 (E.D. Pa. 1960). In the Kontos case, the Court refused to send the lawsuit to Greece because there was no certainty that a Greek Court would take jurisdiction over matters concerning a Liberian ship (p. 837). There is no assurance in the present case that Ecuadoran courts will take jurisdiction over affairs involving an Israeli vessel.

The defendants have not met the burden of showing facts that " **** (1) establish such oppression and vexation of a defendant as to be out of all proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent **** ", as set forth in Hoffman v. Goberman 420 F. 2d 423, 426 (3 Cir. 1970).

Defendants have not shown definite proof of harassment in the preparation and trial of this case.

Counsel did not have oral argument on the motions in this case.

The judgment for forum non conveniens was granted improvidently and the plaintiff should be permitted to pursue his remedies in the District Court.

POINT II

THE SUBSTANTIAL CONTACTS IN THIS CASE ENTITLE THE PLAINTIFF TO A TRIAL BY JURY UNDER THE JONES ACT.

The Court of Appeals of this Circuit made the following comments about the application of the Jones Act in the case of Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437, 440 (2 Cir. 1959) cert. den. 359 U.S. 1000, 79 S. 1138 (1959).

" (1) Hence it must be said that in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus we conclude that the test is that "substantial" contacts are necessary. And while as indicated supra one contact such as the fact that the vessel flies the American flag may alone be sufficient, this no more than to say that in such a case the contact is so obviously substantial as to render unnecessary a further probing into the facts.

Some of the advantages of this simple formula are that it states a rational method of ascertaining the congressional intent, and that in its application there is no occasion to consider and "weigh" the contacts that do not exist, nor to go through any process of balancing one set of facts that are present against another set of facts that are absent, without any sure guide as to how the balancing is to be done. Accordingly, the decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be "weighed" and "evaluated" only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act. We shall now proceed to apply these principles to the case before us. "

Other Courts have defined the meaning of substantiality under different statutes. For example, the Fair Labor Standards Act of 1938, Section 3 (j), 29 U.S.C.A. Section 203 (j) was interpreted in the case of Philips v. Star Overall Dry Cleaning Co., Inc. 55 F. Supp. 238, S.D.N.Y. 1944. The Fair Labor Standards Act was held applicable although only 4% of the Laundry Corporation's production was regularly and continuously in interstate commerce. At the top of page 239 of the opinion, the Court stated that the "Plaintiffs were, therefore, substantially engaged in the production of goods for commerce." This degree of work is much less than the substantial contacts that the steamship company and its affiliates had in this case.

The Philips judgment was affirmed in the Court of Appeals, Second Circuit. Opinion reported at 149 F. 2d 416 (2 Cir. 1945), cert. den. 327 U.S. 780, rehearing den. 327 U.S. 817.

In Webster's Third New International dictionary, G. & C. Merriam Company, Publishers, Springfield, Massachusetts (1964) the word "substantial" is defined as follows at page 2280: ****

The first "substantial" c: being of moment ;

IMPORTANT, ESSENTIAL.

The second "substantial" C: something of moment :

an important or material matter, thing, or part.

THIS IS A LIST OF SUBSTANTIAL UNITED STATES CONTACTS IN THIS LAWSUIT :

a. Direction and control of Western Hemisphere shipping of the defendants through Zim-American as a base of operations in New York City, Zim Israel owns 100% of the stock of Zim-American (17 r, p. 3, ans. 13(d)).

b. Zim-American has approximately 90 employees in New York City (25 r, p. 1, ans. 5 (b)).

c. Zim-American has lines of credit at Bank of America International, 41 Broad Street, New York, New York and at First Israel Bank and Trust Company, 60 Wall Street, New York, New York (25r, p. 2, ans. 7).

d. Zim-American authorized to do business in New York State in May, 1948. Its principal office is One World Trade Center, New York City (17r p. 3-4, ans. 18a-d).

e. Zim-American has an office at 327 South La Salle Street, Chicago, Illinois 60604 (17r, p. 2, ans. 6 b). It is authorized to do business in the State of Illinois, (17r , p. 4, ans. 18 f).

f. Zim-American has three employees in its Chicago office; Captain A. Sharon 5650 Sheridan Road, Chicago, Illinois is the manager; Zim-American has accounts at Harris Trust and Savings Bank , Chicago and at Washington Fede-

ral Savings and Loan Association, Miami (25r, p. 1, ans. 6 c, d, g).

At this point it may be noted that in answer to plaintiff's interrogatory 27 c (4r, p. 5) about the percentage of cargo, by volume and by income, originated in or terminated in the U.S.A. during decedent's employment aboard the M. V. DAHLIA, the defendants answered that they did not know (17 r, p. 5, ans. 27).

g. Hiring and discharge of crew through New York (62-63a Captain Mendelson).

h. Report on economics of decedent's family to New York requesting instructions (84-85a) after receipt of notice of death sent to Ecuador (82-83a).

i. Check and voucher (86a) issued out of New York to widow in exchange for alleged release written in the English Language (51-52a). This alleged release at 51a also contains the endorsement of Lamorte Burns & Co., insurance representatives at One World Trade Center, New York City.

j. Vessel en route to New York at time decedent injured and died.

k. Messages between M. V. DAHLIA and U. S. Coast Guard on treatment for injured seaman and order for autopsy

(28 r).

l. Autopsy performed on decedent in Honolulu, Hawaii.

m. Legal residence of widow in New York City.

n. United States investment in defendants through the Israel Corporation (67-79a), and AMPAL (90-95a).

The Bartholomew opinion went on to speak about contacts at page 443 of 263 F. 2d. :

> " Moreover, this is not a matter resting in the discretion of the trial judge, as seems to have been thought to be the case here. The facts either warrant the application of the Jones Act or they do not. Under 28 U.S.C. 1331, once federal law is found applicable the court's power to adjudicate must be exercised. While at times the impact of intricate questions of state law may require a federal court to stay its hand, Burford v. Sun Oil Co., 1943, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424, and we need not attempt to catalogue other exceptional situations, it is clear that the District Court in the instant case had no discretionary power to refuse to adjudicate the case. "

This quotation from the Bartholomew case supra shows that Jones Act Jurisdiction is mandatory and that the District Court has no right to decline Jurisdiction if substantial U.S. contacts are present. The Bartholomew decision was followed in the United States Supreme Court in the case of Hellenic Lines v. Rhoditis, 398 U.S. 306. In the same Supreme Court opinion the Court cited Pavlou v. Ocean Traders Marine Corp. 211 F. Supp. 320 (S.D.N.Y. 1962) - the Pavlou case declared that if the foreign shipowner had its base of operations in the United States this would be sufficient to have American law apply. In the Rhoditis opinion the Supreme

Court stated :

" The shipowner's base of operations is another factor of importance in determining whether the Jones Act is applicable; and there well may be others ". 398 U.S. , p. 308, 90 S. Ct., p. 1734

This Circuit reaffirmed its adherence to the Bartholomew principles in Moncada v. Lemuria 491 F. 2d. 470, 472, (2 Cir. 1972)

In judging whether substantial contacts exist, we must look to the aggregate of the contacts and not isolate them one by one. Zim-American is an important arm of the Zim shipping operations and is the base of operations of the entire Zim Shipping complex in North and South America. Such a base of operations is sufficient - together with other contacts - to hold that the Jones Act (46 USCA 688) is applicable in this case - Gomez v. Karavias U.S.A. Inc., 401 F. Supp. 104, 107 (S.D.N.Y. 1975).

The text of the Jones Act follows :

"§ 688. Recovery for injury to or death of seaman

" Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar 4, 1915, c. 153 § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007. "

AMERICAN FINANCIAL INTEREST IN THE DEFENDANTS.

With reference to stock ownership requested in interrogatory 13 of the plaintiff filed on August 25, 1971 (4r- page 3), the defendants answered on May 7th, 1974 as follows : (17r - page 3)

(a) " The stock of Zim Israel Navigation Co. Ltd. is owned 50% by the Israeli Government and 50% by the Israel Corporation founded at the instance of the Prime Minister of Israel to aid in the development of the State of Israel and in the interest of the economy of that State.

(b) Shareholders as above.

(c) Israeli citizenship - shareholders.

(d) 10,000 shares authorized, issued and outstanding.

After the plaintiff made a motion for the defendants to reveal the names and addresses of the stockholders of the Israel Corporation, the defendants made the following answer on October 15, 1974 (25r p. 2 ans. 13).

" Said defendants have no knowledge ".

A prospectus issued by the Israel Corporation Ltd. in 1969 to the Securities and Exchange Commission showed that 11 Americans were directors (6-68a, 4-69a, 1-70a) and that 3 American were listed out of the original 7 subscribers to the stock. (72a).

When the plaintiff took the testimony of Harvey M. Kruger, a director of the Israel Corporation, he gave the writer of this brief the annual report of the Israel Corporation for 1973 (74- 79a).

These are extracts from that report.

THE ISRAEL CORPORATION LTD.

NOTES TO THE FINANCIAL STATEMENTS

74a NOTE 4 - CURRENT ASSETS SEGREGATED FOR INVESTMENTS

Subsidiary companies	
Zim Israel Navigation Co. Ltd. (1972)	1,500,000 IL. (Israeli Pounds)

75a NOTE 5 - INVESTMENTS - SUBSIDIARY COMPANY

Zim Israel Navigation Co. Ltd.	Percentage of Interest in Voting 50% Percentage of Interest in Equity 50%

76a NOTE 5 - INVESTMENTS - SUBSIDIARY COMPANIES

Loans:

Zim Israel Navigation Co. Ltd.	12/31	1973	13,650,000 IL.
	12/31	1972	28,350,000 IL.

10,500,000- mortgages on 3 ships. The security has been assigned by the Corporation to the lending shareholders (Note 16).

77a Summary of the Consolidated Financial Statements of the principal subsidiary company, Zim Israel Navigation Co. Ltda., as at December 31, 1973 and 1972.

THE ISRAEL CORPORATION LTD.

NOTES TO THE FINANCIAL STATEMENTS (Cont.)

79a NOTE 23 - CONTINGENT LIABILITIES AND COMMITMENTS

A. Guarantees for subsidiary and affiliated companies and for the limited partnership :

(7) Zim Israel Navigation Co. Ltd.	D. M. 37,000,000 and December 31, 1972	December 31, 1973
	Guarantee to Shipyard.	

When the plaintiff asked interrogatories about the ownership of the defendants, at the time the decedent was in their employ, they first answered that Zim-Israel was owned 20% by the Israel Corporation. When asked again about the names and addresses of the shareholders of the Israel Corporation, the defendants replied that they had no knowledge. This certainly showed a lack of candor. The documents filed with the Securities Exchange Commission, showed that the Israel Corporation was founded after the decedent's service aboard the vessel. Nevertheless, the defendants have not explained in any way, their answer that the Israel Corporation owned 20% of the stock of the defendant Zim Israel. Because of this lack of candor about the names and addresses of the stockholders of the Israel Corporation, the plaintiff claims that Zim Israel should be treated as an American Corporation. The same result was reached in the case of Southern Cross Steamship Co. v. Firipis, 285 F. 2d. 651,

655 (4 Cir. 1960).

The references below are to the 30th Annual Report of AMPAL - American Israel Corporation - for the period between 1942 and 1971 (90-95a);

91a MOTTO - AMERICAN CAPITAL FOR UPBUILDING OF ISRAEL

93a CREDITS GRANTED AND INVESTMENTS MADE FOR THE DEVELOPMENT OF ISRAEL .

6. American Israel Shipping Co. - Israel Amer. Line Ltd.

1942 - 1951	$285,000.00
1952 - 1961	$105,000.00
1962 - 1971 -	-
Total	$390,000.00

76. Zim Israel Navigation Co. Ltd. - Israel Maritime Co. Ltd.

1942 - 1951	-
1952 - 1961	$10,255,787.03
1962 - 1971	$ 80,705.00
Total	$10,336,492.03
1/31/72 Balance	$ 1,344,705.00

94a " The Israel Corporation now holds 50% of the shares of Zim Israel Navigation Co. Ltd. *** " .

95a AMPAL-AMERICAN ISRAEL CORPORATION
DIRECTORS AND OFFICERS
15 listed from the United States, 5 from Israel .

ISRAEL DEVELOPMENT CORPORATION
DIRECTORS AND OFFICERS
16 listed from the United States.

NATIONAL BOARD-AMPAL-AMERICAN ISRAEL CORPORATION
25 listed from the United States , 1 from Israel.

Through scanning the summaries of the two corporations that provide financial backing for the two defendants, we can see substantial contacts with the United States. The group of contacts listed on pages 16 and 17 of this brief prove substantial connections with the United States so that the application of the Jones Act is mandatory under the Bartholomew case supra 263 F. 2d. p. 443. It is not necessary for the plaintiff to show that the flag of the defendants is a flag of convenience, but only to show a group of substantial contacts of the lawsuit with the United States.

Opinion 42430 of the District Court refers to the fact that "had the Captain sought medical assistance at the time of decedent's injury, he would have to returned to port and sought out a Japanese physician." (110a). This is an illustration of an absent factor that the Bartholomew Court stated should not be considered in weighing existing contacts.

The District Court's order and judgment provided that the case against Zim Israel be transferred to Israel. (132a) The following quotation is from the letter of 20th of November, 1973 from the head office of the National Insurance Institute in Israel : (87a)

" In accordance with the National Insurance Law, a person who is not an Israeli resident and died from an accident abroad, is not insured in the Employment Injury Insurance Branch and his survivors are not entitled to any benefits from the National Insurance Institute. "

This letter above and the two other answers from the National Insurance Institute in Israel (88-89a) prove that no remedy exist for the recovery of damages by the decedent's family in Israel. The defendants

rejected Ecuador as a forum when they had the decedent sign an adhesion contract, providing for the application of Israeli law in case of injury or death. Actually the defendants have been harassing the widow and her daughter through this provision. In the case of Lauritzen v. Larsen, 345 U.S. 571, 589 the Supreme Court held that an inaccessible forum was ground for retaining a seaman's case in the United States.

In the Rhoditis case Supra, the Supreme Court disregarded an adhesion contract similar to the one in this case - where one party has a towering advantage over the other on an agreement about working conditions on a ship. In the case of Blanco v. Phoenix et al. 304 F. 2d 13 (4 Cir. 1962), the Court disregarded a limitation on the amount of money to be recovered in case of injury to a seaman- this limitation being in an adhesion contract. The Fourth Circuit retained jurisdiction of a Peruvian seaman's action against the Peruvian Steamship where he was injured - 12 F. 2d. 500 (4 Cir. 1926), Heredia v. Davies.

Both defendants are commercial domiciliaries of the United States, in competition with American Steamship Companies, such as the United States Lines and American Export Isbrandtsen Company. As such domiciliaries, their national character and allegiance belong to the United States The Frances 12 U.S. 363; The Venus 12 U.S. 253, 283.

It is important that a Jones Act case should be heard in the United States. The substantial contacts of this lawsuit with the Unites States make the application of the Jones Act mandatory, and not discretionary.

POINT III

TRIABLE ISSUES OF FACT EXIST ON EMPLOYMENT OF THE DECEDENT AND OPERATION OF THE VESSEL; SUMMARY JUDGMENT IS NOT PROPER FOR DISMISSAL OF A SEAMAN'S ACTION AGAINST AN ALLEGED AGENT

A question of fact exists as to whether Zim-Israel or its 100% owned New York subsidiary ZIM-AMERICAN is the owner of the vessel and the employer of the decedent.

The following facts are present in this case :

1. Hiring of the crew of ZIM ships in North and South America through ZIM-AMERICAN.
2. Payment through voucher and check out of New York in exchange for alleged release in this case.
3. Intertwining of managerial, financial and operating functions between these two defendants.

The District Court cited the case of Cosmopolitan Shipping Co. v. McAllister, 337 US 783, 795, (1949) (113a). The Cosmopolitan case was decided after a trial on the merits and not by summary judgment.

Another case which holds that employment and ownership should be determined only after a trial is Lonnberg v. Knox 123 N.Y. Misc. Rep. 148, 150;

> " We think the evidence submitted by both sides raised a factual question as to which of the defendants was the actual owner of the bark and employer of the plaintiff, that should have been submit-

ted to the jury for determination. "

The following documents declare the understanding of the Guayaquil, Ecuador, agent of Zim-American as to who was the owner of the M. V. DAHLIA :

1. Certificate of service of decedent (80-81a).
2. Request for instructions to New York on care of decedent's family (84-85a).
3. Check and voucher from New York to widow in exchange for alleged release (86a).

The District Court in Opinion 42430 referred to the case of McCoy v. American Israeli Shipping Co. Inc., et al, 42 AD 2d. 12 , 344 NYS 2d. 717 (1st Dept. 1973) aff'd 34 NY 2d. 569 (1974) (113a). The attorney for the plaintiff in the McCoy case conceded that Zim Israeli was the owner of the ship. The widow of the decedent has never made such a concession and has produced documents indicating that Zim-American owned, operated and managed the affairs of the M. V. DAHLIA.

Further, the documents produced by the plaintiff show American stock ownership in the defendants-which is certainly above the speculation referred to in the McCoy opinion.

Another case mentioned at page 8 of District Court opinion 42430 is Scully v. Zim Israel Navigation Co. Ltd., 1968 A. M. C. 1209 (S. D. N. Y. 1968) (113a).

In the Scully case no facts were presented about American owner-

ship in the defendants or about the employment of the crew of the vessel. If Zim Israel employed an independent agent like Norton Lilly & Co. of New York, there would be no question that the agent Norton Lilly would be a true agent and not the Western Hemisphere executive of a world-wide shipping combine.

The situation in the case at bar is similar to the state of facts in Armit v. Loveland, 115 F. 2d. 308 (3Cir. 1940) where the Appellate Court upheld a verdict under the Jones Act against three defendants as employers. The following quotation is from page 314 of that opinion :

> *** " if the defendants so scrambled their relations as to render it difficult for anyone to say for a certainty whether the plaintiff was employed by only one or by all of them that should not serve to defeat the plaintiff's right by relieving a responsible defendant. To hold otherwise would be to put a premium upon the confusion which the defendants themselves created. The ones responsible for it should be the ones to dispel it, which they can do by adjusting their respective liabilities inter se. In the circumstances here present, we can see no legal necessity for requiring the plaintiff to grope around in search of his employer's identity among corporate entities and individuals, all of whom are shoots off the same stock and engaged in a common activity. A verdict against all three defendants was warranted. Lang et al. vs. Hanlon et al., 302 Pa. 173, 178, 153 A 143 ".

The case of Heyman v. Commerce and Industry Insurance Company was decided by this Circuit Court on October 24, 1975. (opinion reported in New York Law Journal November 20, 1975 page 1, column 8).

Chief Judge Kaufman set down the following guidelines on granting summary judgment :

1. The Court cannot try issues of fact; it can only determine

whether there are issues to be tried.

2. All ambiguities must be resolved and all reasonable inferences drawn in favor of the party against whom summary judgment is sought ;

3. The moving party has the burden to demonstrate the absence of any material factual issue genuinely in dispute.

Judged by these criteria, the granting of summary judgment in favor of the defendant Zim-American was error and the determination of employment and ownership should be decided only after a full trial.

The defendants have not met their burden of proof by providing admissible evidence to show who was the employer of the decedent and the owner of the M.V. DAHLIA. Who actually controlled the vessel is not clear. Issues of fact clearly exist and the plaintiff has an absolute right to be in Court.

POINT IV

WHEN JURISDICTION IS EXPRESSLY GIVEN BY CONGRESSIONAL STATUTE TO A UNITED STATES COURT, THE COURT MUST HEAR THE CASE WHEN IT HAS IN PERSONAM JURISDICTION AND IT CANNOT DECLINE SUBJECT MATTER JURISDICTION.

Since 1886 the doctrine of the Harrisburg 119 U.S. 199, had forbidden any recovery for death on the High Seas under the General Maritime Law. After eighty=four years the Supreme Court of the United States abolished the Harrisburg rule and declared that a recovery could be achieved under the General Maritime Law for death on the High Seas, Moragne v. States Marine Lines, 398 U.S. 375 (1970).

During the course of its opinion, the Supreme Court made these observations :

(p. 390) " These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law "***"

(p. 393)" Our undertaking, therefore, is to determine whether Congress has given such a direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain. We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner."

In the Bartholomew opinion, supra, 263 F. 2d. 437, 441 this Court held that jurisdiction under the Jones Act (46 U.S.C.A. 688) was mandatory. By the same logic, jurisdiction under the Death on High Seas Act. (hereinafter called DOHSA) is mandatory and not declinable.

THE HISTORY AND PURPOSE OF THE DEATH ON HIGH SEAS ACT (DOHSA 46 U.S.C.A. 761-768) SHOW THAT THE DISTRICT COURT MUST ACCEPT JURISDICTION WHEN GIVEN BY THIS CONGRESSIONAL STATUTE.

When Congress enacted the Death on High Seas Act (46 USCA 761-768, hereinafter called DOHSA) it was the capstone of many efforts to have Federal Maritime jurisdiction for deaths on the high seas. The Titanic disaster of 1912 spurred Congress to action because of the unsatisfactory disposition of death claims of United States citizens and citizens of other countries arising from this catastrophe. Before DOHSA, the courts had tried to parcel out exeptions to the Harrisburg doctrine, 119 U.S. 199 (1886), but the results were unsatisfactory.

At page 11 of the District Court's opinion No. 42 30 (116a), it refers to its "conceded power to retain jurisdiction." When Congress establishes a right or power through a statute, the District Court cannot dismiss a case brought under such statute on the ground of insufficient contacts or in the exercise of the Court's discretion.. Section 761 of DOHSA gives the personal representative of the decedent the right to recover under United States law ; Section 764 of DOHSA gives the right to recover under foreign law .Because jurisdiction is expressly given to the District Court under these statutes, and considering the history of international maritime disasters on the high seas, there is no right to decline jurisdiction in the District Court. The plaintiff can recover under American or

foreign law because his law suit is based on a right given by Congress. State Courts may decline jurisdiction of a right created by Congress, but not a Federal Court. The rights under DOHSA created by Congress are not limited by United States contacts or by judicial discretion..

In Tsangarakis v. Panama S. S. C., 197 F. Supp. 704 (ED Pa. 1961) the District Court permitted the plaintiff in a death action under DOHSA to amend his complaint and to proceed to trial on inconsistent theories of recovery.

Lakos v. Saliaris 116 F. 2d. 440 (4 Cir. 1940).

This was a libel in admiralty by five Greek seamen against the Greek Steamship Leonidas - a suit completely between foreigners. The plaintiff sought to recover wages under a United States statute - 46 USCA 597; the District Court declined jurisdiction. The Court of Appeals reversed the decree and held that the case should be heard. This quotation is from page 444 of the Court's opinion :

> " After pointing out that the protection of American seamen demands that these provisions of the law be enforced with respect to foreign seamen as well, since otherwise foreign seamen would have an advantage in obtaining employment, the court in Strathearn S.S. Co. v. Dillon, supra, went on to say, 252 U.S. page 355, 40 S. Ct. page 352, 64 L. Ed. 607," But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. " Foreign seamen would manifestly not be placed on an equality of right with American seamen "with equal opportunity to resort to the courts of the United States for the enforcement of the act",

> if the courts were at liberty in their discretion to decline jurisdiction of such suits instituted by foreign seamen. And to this we may add that, in the language of Chief Justice Marshall, " We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 6 Wheat. 264, 404, 5 L Ed. 257." (underlining supplied)

O'Donnell v. Elgin, Joliet and Eastern Ry Co., 193 F. 2d. 348 (7 Cir. 1952). This case was brought under the Federal Employers' Liability Act-on which the Jones Act is based. (Text of Jones Act page 19 of this brief) Point II of this brief explains the reasons why the plaintiff believes that the Jones Act should apply in the case at bar. In the O'Donnell case plaintiff administratrix was appointed in an Indiana Court and brought suit under the Federal Employers' Liability Act, 45 USCA 51 to 60, in the United States District Court in Illinois. The Court held that an Illinois statute limiting the capacity of foreign administrators to bring suit in Illinois courts did not apply to a Federal statute given authority to the United States District Courts to hear such suits in Illinois. At page 353 of its opinion the Court made the following statement :

> " It is plain, of course, that Congress conferred jurisdiction both upon the Federal and State Courts to entertain suits for the vindication of rights established by the Federal Act, but it is also plain from the authorities cited and discussed that Congress did not by use of the word "concurrent" make the jurisdiction of either dependent upon the other. The jurisdiction of the Federal Courts is mandatory in the sense that such a Court is without discretion to disclaim it in a case where a plaintiff has brought himself within the terms of the Federal Act ***"

See also Willcox v. Consolidated Gas Co., 212 US 19 (1909) ; Mach-Tronics, Inc. v. Zirpoli, 316 F. 2d. 820, 824 (9 Cir. 1963); Federal Savings & Loan Insurance Corp., v. Krueger, 435 F. 2d. 633, 637 (7 Cir. 1970).

On reargument in the District Court, the plaintiff moved to amend the complaint and allege a cause of action based on Ecuadoran law under 46 USCA 764 but the Court denied the plaintiff's motion. (129a) The text of 46 USCA 764 follows :

> " Rights of action given by laws of foreign countries. Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropiate action in admiralty in the Courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary not withstanding. Mar. 30, 1920, c. 111, § 4, 41 Stat. 537."

Because jurisdiction under the Jones Act (46 USCA 688) is mandatory in this case, the District Court should have retained jurisdiction under 46 U.S.C.A. 761 of DOHSA- providing for the application of United States law; or

The plaintiff should be permitted to amend his complaint and plead Ecuadoran law under 46 USCA 764 of DOHSA; the District Court of the Southern District of New York to retain jurisdiction of this case.

CONCLUSION

1. The order of the District Court dismissing this action against Zim Israel on the ground of forum non conveniens should be reversed in the interests of justice and fairness, and jurisdiction of this case be retained for a trial on the merits in the Southern District of New York.

2. The judgment of the District Court dismissing this action as to Zim Israel for lack of subject -matter jurisdiction, be reversed be ause sufficient contacts exist between this case and the United States, and the plaintiff be allowed to proceed to trial and judgment on the merits under the Jones Act (46 USCA 688), the General Maritime Law and DOHSA (46 USCA 761-768) in the Southern District of New York.

3. The judgment of the District Court granting summary judgment in favor of the defendant Zim-American be reversed because questions of fact are present on the employment of the de dent and ownership of the vessel; the defendant Zim-American shall be continued as a party defendant in this action for a trial on the merits.

4. The order of the District Court denying the motion of the plaintiff to plead Ecuadoran law under 46 USCA 764 of DOHSA

CONCLUSION (continued)

be overruled and the plaintiff be allowed to amend his complaint to plead Ecuadoran law and to proceed to a trial on the merits in the Southern District of New York.

Respectfully submitted,

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